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# Supreme Court of the United States

**OCTOBER TERM, 1959**

**No. 472**

UNITED STATES OF AMERICA, EX REL. SOL R. RAUCH and HAROLD D. RAUCH,
*Relators-Petitioners,*
*against*
JOSEPH STOCKINGER and ALEX KRINSKY,
*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI, ON BEHALF OF THE ATTORNEY GENERAL OF THE PROVINCE OF ONTARIO, CANADA, AS AMICUS CURIAE

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## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI, ON BEHALF OF THE ATTORNEY GENERAL OF THE PROVINCE OF ONTARIO, CANADA, AS AMICUS CURIAE

### Facts

On or about August 21, 1958, the Government of Canada made formal request to the Secretary of State of the United States for the extradition and delivery of the Defendants, Sol R. Rauch and Harold D. Rauch, accused of committing the crime of theft of money and securities and of fraudulently obtaining money and securities by deceit, falsehood or other fraudulent means, committed within the jurisdiction of Canada. On or about August 26, 1958, the Acting Secretary of State of the United States acknowledged receipt of this request, and informed the Ambassador of Canada that the Department of State will be pleased to give consideration to this request when the necessary legal procedures set forth in Section 3184 of Title 18 of the United States Code have been completed.

On or about September 26, 1958, complaints were filed against each of the defendants with the United States Commissioner for the Eastern District of New York, and warrants issued for their apprehension. On October 6, 1958, both defendants surrendered to the United States Marshal, and were arraigned before Honorable Salvatore T. Abruzzo, where they were paroled in their own custody, pending a hearing subsequently set for October 24, 1958.

The following documentary evidence was submitted upon said hearing.

1. Two letters dated August 21, 1958, showing the appointment and authorization of Alexander Dreiband, Esq., to act for the Attorney General of the Province of Ontario (Exhibit 1 in evidence, Minutes of Hearing, page 3, November 5, 1958).

2. Authenticated copies of the communications between His Excellency, Ambassador of Canada and the State Department of the Government of the United States (Exhibit 2 in evidence, Minutes of Hearing, page 3, November 5, 1958).

3. Pamphlet of Treaties, Series No. 1952, containing copies of all of the treaties concerning extradition between the Government of Canada, the Government of Great Britain and the Government of the United States (Exhibit 3 in evidence, Minutes of Hearing, page 6, November 5, 1958).

4. Authenticated and Exemplified copies of indictment by Grand Jury in the Province of Ontario, York County, against both defendants (Exhibits 4 and 4A in evidence, Minutes of Hearing, page 11, November 5, 1958).

5. Exemplified copies of documents and depositions consisting of the following papers:

(a) Certificate of Counsel General of the United States, at Toronto, Canada (Exhibits 5 and 5A in evidence).

(b) Certificate of the Provincial Secretary of the Province of Ontario (Exhibits 5 and 5A in evidence).

(c) Certificate of Justice of Peace J. Little, for the County of York, Province of Ontario (Exhibits 5 and 5A in evidence, page 4).

(d) Information and sworn complaint of William S. Irvin, auditor, Ontario Securities Commission (Exhibits 5 and 5A in evidence, page 5).

(e) Warrants of arrest against defendants, issued by Justice of Peace, J. Little, charging crimes of theft and fraud (Exhibits 5 and 5A in evidence, pages 7 and 8).

(f) Certificate re transcription of Depositions dated July 21, 1958, by Official Court Stenographer, Charles Hamilton (Exhibits 5 and 5A in evidence, pages 9 and 9A).

(g) Deposition of Benjamin Walter Chechak (Exhibits 5 and 5A in evidence, pages 10 to 13).

(h) Deposition of Fred Findlay (Exhibits 5 and 5A in evidence, pages 14 to 23).

(i) Deposition of Frank Ernest Udell (Exhibits 5 and 5A in evidence, pages 24 to 32).

(j) Deposition of Ian Holt Smith (Exhibits 5 and 5A in evidence, pages 33 to 56, with deletions as indicated in record of hearing November 18, 1958).

(k) Deposition of Vernon Franklin Bowman (Exhibits 5 and 5A in evidence, pages 57 to 63).

(l) Deposition of James Hugh Gilmour Wallace (Exhibits 5 and 5A in evidence, pages 64 to 73).

(m) Affidavit of Peter White, Q.C., setting forth Statutes of Criminal Code of Canada applicable upon this proceeding (Exhibits 5 and 5A in evidence, pages 74 to 79).

(n) Folder of Exhibits introduced through depositions of Benjamin Walter Chechak, Fred Findlay, Frank Ernest Udell, Ian Holt Smith, Vernon Franklin Bowman and James Hugh Gilmour Wallace (Exhibits 5 and 5A in evidence, pages "B" 1 to 41).

After hearings held on November 5, 18, 21, and 26, 1958, before Honorable Salvatore T. Abruzzo, United States Commissioner for the Eastern District of New York, a determination was made by the Commissioner in part as follows:

> "The prosecution has, by ample evidence, established probable cause that the crime of larceny as contained in the Penal Law of Canada, and as defined by the Treaties and Supplementary Conventions thereto, and the Penal Laws of the State of New York, was committed by the Defendants, and the Commissioner will certify to the Secretary of State that the Defendants be extradited to the Province of Ontario, Canada, for prosecution." (Minutes of Hearing, pages 217—line 20 to page 218, line 5.)

After this decision by the Commissioner, the defendants were remanded to the custody of the United States Marshal. They were subsequently released on bail, pending the determination of the Writ of Habeas Corpus.

In an opinion dated February 16, 1959, Hon. Mortimer W. Byers dismissed the Writ of Habeas Corpus, and wrote the following opinion:

> "BYERS, Ch.J.:
>
> A writ of Habeas Corpus was granted bearing the above caption, to inquire into the legality of the custody of the U. S. Marshal for this District into which the relators were ordered, pending their extradition to Canada, at the instance of the Government of that country.
>
> The Commissioner before whom the proceedings was laid pursuant to Tit. 18 U. S. C. Sec. 3184, has

decided and determined that 'the prosecution has, by ample evidence, established probable cause that the crime of larceny as contained in the Penal Law of Canada, and as defined by the Treaties and Supplementary Conventions thereto, and the Penal Laws of the State of New York, was committed by the defendants, and the Commissioner will certify to the Secretary of State that the defendants be extradited to the Province of Ontario, Canada, for prosecution.'

There are five persons named in the indictment filed in the Supreme Court of Ontario, of whom but two, Sol R. Rauch and Harold D. Rauch are the relators before the Court.

No question of identity is involved, since that was conceded in the record before the Commissioner.

It is stated in the complaint or petition for extradition that the indictment was filed on September 8, 1958. An examination of the documentary evidence submitted to the Commissioner (there was no oral testimony) is convincing to this Court that the action taken was legally justified, and the Writ will be dismissed for reasons briefly to be stated.

For present purposes, the offences charged in the indictment are:

(1) that the defendants named, during the year 1957 at Toronto and elsewhere, 'did steal money and securities to the value of $960,000.00 more or less, the property of Brilund Mines Limited, contrary to the Criminal Code'.

(2) that the said defendants during the same year and at the same places 'by deceit, falsehood or other fraudulent means defrauded Brilund Mines Limited of money and securities to the value of $960,000.00 more or less, contrary to the Criminal Code'.

It is not argued for the relators that the documentary evidence submitted to the Commissioner, namely the original information, the indictment

later filed, and the depositions upon which the said charges were laid, do not constitute a prima facie showing that the relators did the things charged. The contention is that the failure to include in the indictment the words 'with intent to, etc.' render it of no legal effect, and that the Commissioner should have so held, and refused to grant extradition.

The controversy can be resolved without extensive discussion because:

A. The applicable treaties provide that extraditable offences include:

1. Larceny

2. Obtaining money, valuable securities or other property by false pretenses; or by defrauding the public by deceit or falsehood or any fraudulent means whether such deceit would or would not amount to a false pretense.

See treaties between the United States and Great Britain of 1842, 1889 and 1900. The Supplemental Convention of July 12, 1889 may be consulted in this connection.

B. The offences charged fall within the provision of Art. X of the treaty of 1842 which requires delivery up of all persons where the evidence of criminality is according to the laws of the place (New York State in this instance) where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial."

See Penal Law of the State of New York, Sections 1290, 1294, 1295.

C. The following language of the Supreme Court (Mr. Justice Holmes) in *Gluckman* v. *Henkel*, 221 U. S. 508, at 512, is thought to apply here:

"It is common in extradition cases to attempt to bring to bear all the factitious niceties of a criminal trial at common law. But it is a waste of time. For while of course a man is not to be sent from the country merely upon demand or surmise, yet if

There is presented, even in somewhat untechnical form according to our ideas, such reasonable ground to suppose him guilty as to make it proper that he should be tried, good faith to the demanding government requires his surrender. *Grin* v. *Shine*, 187 U. S. 181, 184. See *Pierce* v. *Creecy*, 210 U. S. 387, 405."

See further,

*Wright* v. *Henkel*, 190 U. S. 40;
*Factor* v. *Laubenheimer*, 290 U. S. 276;
*U. S. ex rel. Hattfield*, 11 Fed. Supp. 806, modified 87 Fed. (2) 358, cert. den. 300 U. S. 678.

D. While it is true that both the Criminal Code of Canada in Sections 269 (1), 274, 276, 280, 323(1), 2(15) et seq. are relied upon to support the indictment, the first named is the one upon which the relators' present argument is based. That section reads:

"SECTION 269

(1) Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his own use or to the use of another person, anything whether animate or inanimate, with intent

(a) to deprive temporarily or absolutely, the owner of it or a person who has a special property or interest in it, of the thing or of his property or interest in it,

(b) to pledge it or deposit it as security,

(c) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform, or

(d) to deal with it in such a manner that it cannot be restored to the condition in which it was at the time it was taken or converted.

(2) A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment.

(3) For the purpose of this act the question whether anything that is converted is taken for the purpose of conversion, or whether it is, at the time it is converted, in the lawful possession of the person who converts it is not material."

It is the presence of the words "with intent" in the statute, and their absence from the indictment, that the relators rely upon to sustain their cause.

Section 1290 of the New York Penal Law dealing with larceny provides that "a person who, with *intent* (ital. supplied) to deprive or defraud another of the use and benefit of property etc. wrongfully takes, obtains or withholds, by any means whatever, from the possession of the true owner any money * * *, steals such property, and is guilty of larceny".

If the matter were before me for decision, I should find no difficulty in holding that to charge a man with stealing certain property from its true owner, in violation of the above statute, would be to charge him with intentionally depriving another of his property, i.e., with larceny; that the word 'steal' necessarily involves the required intent, and plainly negatives a benevolent or lawful purpose. It is the sheerest sophistry to argue otherwise.

As to the Criminal Code of Canada, Section 323, par. 37, provides:

" 'Steal' means to commit theft."

The present holding is that within the restricted inquiry permitted in a habeas corpus proceeding to test the validity of extradition as to these relators, they have been charged with the intent necessary to require them to stand trial upon the indictment in question.

E. The argument is specious that the second charge in the indictment is deficient in failing to contain a concise statement of the acts constituting the alleged crime of defrauding the named corpora-

tion of its property, by "deceit, falsehood or other fraudulent means". No necessity is seen nor sought to be expounded for holding that the Government should have been required to plead the evidence upon which it relies.

Incidentally the relators have had the benefit of the depositions which were before the Commissioner, and if they are entitled to what we should call further particulars, it is to be expected that the trial court will deal with their requests according to accepted use and practice.

Reference may be had to Subd. 2 of Section 269 of the Criminal Code of Canada to the effect that "A taking or conversion of anything may be fraudulent notwithstanding that it was effected without secrecy or attempt at concealment." (Findlay's deposition, p. 16, therefore does not aid the relators.)

Section 274 provides for conviction of theft notwithstanding that the subject-matter was stolen (c) by the directors, officers or members of a company, body, corporate, * * * from the company * * * as the case may be."

If the Commissioner thought that the documentary evidence presented to him, spelled out the probable commission of an offence by the relators, falling within the foregoing provisions, it must be said that this court agrees with him.

F. The remaining contention that the indictment is not sufficiently explicit as to the sum involved in each count, namely $960,000.00 "more or less", is not worthy of serious consideration. If the expression is not adequate to indicate the approximate sum involved in the respective charges, nothing that this court can say will render them more so.

In sum, the relators have been fairly apprized of the charges laid against them, the offences charged are extradictable, and there was reasonable cause presented to the Commissioner to hold them for extradition. Therefore the Writ of Habeas Corpus is hereby dismissed."

## Statutes Involved

### Section 3184, Title 18, United States Code Annotated

Sec. 3184: FUGITIVES FROM FOREIGN COUNTRY TO UNITED STATES.

"Whenever there is a treaty or convention for extradition between the United States and any foreign government, any Justice or Judge of the United States, or any Commissioner authorized so to do by a Court of the United States, or any Judge of a Court of Record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such Justice, Judge or Commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

### Section 3186, Title 18, United States Code Annotated

Sec. 3186: SECRETARY OF STATE TO SURRENDER FUGITIVE.

"The Secretary of State may order the person committed under Sections 3184 or 3185 of this title to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged.

Such agent may hold such person in custody, and take him to the territory of such foreign government, pursuant to such treaty * * *."

**Section 3190, Title 18, United States Code Annotated**

SECTION 3190. EVIDENCE ON HEARING.

"Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the Tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required."

**Section 3195, Title 18, United States Code Annotated**

SECTION 3195. PAYMENT OF FEES AND COSTS.

"All costs or expenses incurred in any extradition proceeding in apprehending, securing and transmitting a fugitive shall be paid by the demanding authority.

All witness fees and costs of every nature in cases of international extradition, including the fees of the Commissioner, shall be certified by the Judge or Commissioner before whom the hearing shall take place to the Secretary of State of the United States, and the same shall be paid out of appropriations to defray the expenses of the Judiciary or the Department of Justice as the case may be.

The Attorney General shall certify to the Secretary of State the amounts to be paid to the United States on account of said fees and costs in extradition cases by the foreign government requesting the extradition, and the Secretary of State shall

cause said amounts to be collected and transmitted to the Attorney General for deposit in the Treasury of the United States."

The Criminal Code of Canada, being Chapter 51, 2-3 Eliz. II, Statutes of Canada, 1953-1954, with amendments thereto, contains the law with regard to criminal offenses for the whole of the Dominion of Canada and every Province thereof, including the Province of Ontario. Said Criminal Code embodies the following provisions:

SECTION 269

(1) "Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his own use or to the use of another person, anything whether animate or inanimate, with intent

(a) to deprive temporarily or absolutely, the owner of it or a person who has a special property or interest in it, of the thing, or of his property or interest in it,

(b) to pledge it or deposit it as security,

(c) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform, or

(d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.

(2) A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment.

(3) For the purpose of this act the question whether anything that is converted is taken for the purpose of conversion, or whether it is, at the time it is converted, in the lawful possession of the person who converts it is not material".

SECTION 274

"A person may be convicted of theft notwithstanding that anything that is alleged to have been stolen was stolen

(a) by the owner of it from a person who has a special property or interest in it,

(b) by a person who has a special property or interest in it from the owner of it,

(c) by the directors, officers or members of a company, body corporate, unincorporated body or of a society associated together for a lawful purpose from the company body corporate, unincorporated body or society, as the case may be".

SECTION 276

(1) "Everyone commits theft who, having received anything from any person on terms that require him to account for or pay it or the proceeds of it or a part of the proceeds to that person or another person, fraudulently fails to account for or pay it or the proceeds of it or the part of the proceeds accordingly.

(2) Where subsection (1) otherwise applies, but one of the terms is that the thing received or the proceeds or part of the proceeds of it shall be an item in a debtor and creditor account between the person who receives the thing and the person to whom he is to account for or to pay it, and that the latter shall rely only on the liability of the other as his debtor in respect thereof, a proper entry in that account of the thing received or the proceeds or part of the proceeds of it, as the case may be, is a sufficient accounting therefore, and no fraudulent conversion of the thing or the proceeds or part of the proceeds of it thereby accounted for shall be deemed to have taken place".

SECTION 280

"Except where otherwise prescribed by Law, every one who commits theft is guilty of an indictable offense and is liable

(a) to imprisonment for ten years, where the property stolen is a testamentary instrument or where the value of what is stolen exceeds fifty ($50.—) Dollars or

(b) to imprisonment for two years, where the value of what is stolen does not exceed fifty ($50.—)".

SECTION 323

"(1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any persons, whether ascertained or not, of any property, money or valuable security, is guilty of an indictable offense and is liable to imprisonment for ten years".

SECTION 2

"(15) 'every one', 'person', 'owner', and similar expressions include Her Majesty and public bodies, bodies corporate, societies, companies, and inhabitants of counties, parishes, municipalities and other districts in relation to the acts and things that they are capable of doing and owning respectively.

32. "property includes

(a) real and personal property of every description and deeds and instruments relating to or evidencing the title or right to property, or giving a right to recover or receive money or goods.

(b) property originally in the possession or under the control of any person, and any property into or for which it has been converted or exchanged and anything acquired at any time by such conversion or exchange.

37. "steal" means to commit theft.

42. "valuable security" include

(a) an order, exchequer acquittance or other security that entitles or evidences the title of any person

(i) to a share or interest in a public stock or fund or in any fund of a body corporate, company or socie., , or

(ii) to a deposit in a savings bank or other bank".

Larceny as known in the Law of England and in the State of New York, is designated in Canada as theft covered by the definition of theft as heretofore herein quoted. The sections of the Penal Law of the State of New York, applicable, and which set forth the same crimes as that which the defendants are charged with having committed in Canada are as follows:

**Section 1290 of the Penal Law of the State of New York**

1290, LARCENY DEFINED

"A person who, with intent to deprive or defraud another of the use and benefit of property or to appropriate the same to the use of the taker, or of any other person other than the true owner, wrongfully takes, obtains or withholds, by any means whatever, from the possession of the true owner or of any other person any money, personal property, thing in action, evidence of debt or contract, or article of any kind, steals such property, and is guilty of larceny.

Hereafter it shall be immaterial in, and no defense to, a prosecution for larceny that:

1. The accused obtained possession of, or title to, such property with the consent of the person from whom he obtained it, provided he induced such consent by a false or fraudulent representation, pretense, token, or writing; or

2. The accused in the first instance obtained possession of, or title to, such property lawfully, provided he subsequently wrongfully withheld or appropriated such property to his own use or the use of any person not entitled to the use and benefit of such property; or

3. The person from whom the accused obtained such property intended to part with title to, as well as possession of, such property, or with possession as well as title; or

4. The purpose for which the owner was induced to part with possession of such property was immoral or unworthy".

**Section 1294 of the Penal Law of the State of New York**

SECTION 1294. GRAND LARCENY IN FIRST DEGREE

"A person is guilty of grand larceny in the first degree, who steals, or unlawfully obtains or appropriates, in any manner specified in this article:

1. * * *

2. * * *

3. Property of the value of more than five hundred ($500.—) Dollars, in any manner whatever".

**Section 1295 of the Penal Law of the State of New York**

SECTION 1295. GRAND LARCENY IN THE FIRST DEGREE; HOW PUNISHED

"Grand larceny in the first degree is punishable by imprisonment for a term not exceeding ten years."

## Treaties Involved

[1] TREATY BETWEEN HER MAJESTY AND THE UNITED STATES OF AMERICA. TO SETTLE AND DEFINE THE BOUNDARIES BETWEEN THE POSSESSIONS OF HER BRITANNIC MAJESTY IN NORTH AMERICA, AND THE TERRITORIES OF THE UNITED STATES; FOR THE FINAL SUPPRESSION OF THE AFRICAN SLAVE TRADE; AND FOR THE GIVING UP OF CRIMINALS, FUGITIVE FROM JUSTICE IN CERTAIN CASES.

Signed at Washington, August 9, 1842

(Ratifications exchanged at London, October 13, 1842)

[1] From British and Foreign State Papers, Vol. 30, p. 360.

## Article X

It is agreed that Her Britannic Majesty and the United States shall, upon mutual requisitions by them or their Ministers, Officers, or Authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found within the territories of the other; provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed; and the respective Judges and other Magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such Judges or other Magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining Judge or Magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive.

## Article XI

The Xth Article shall continue in force until one or the other of the parties shall signify its wish to terminate it, and no longer.

1889

## [1] Supplementary Convention Between Her Majesty and the United States of America for the Extradition of Criminals

Signed at Washington, July 12, 1889

(Ratifications exchanged at London, March 11, 1890)

Whereas by Article X of the Treaty concluded between Her Britannic Majesty and the United States of America on the 9th day of August, 1842, provision is made for the extradition of persons charged with certain crimes.

And whereas it is now desired by the High Contracting Parties that the provisions of the said Article should embrace certain crimes not therein specified, and should extend to fugitives convicted of the crimes specified in the said Article and in this Convention;

The said High Contracting Parties have appointed as their Plenipotentiaries to conclude a Convention for this purpose, that is to say:—

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, Sir Julian Pauncefote, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Knight Commander of the Most Honourable Order of the Bath, and Envoy Extraordinary and Minister Plenipotentiary of Her Britannic Majesty to the United States;

And the President of the United States of America, James G. Blaine, Secretary of State of the United States;

Who, after having communicated to each other their respective full powers, found in good and due form, have agreed upon and concluded the following Articles:

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[1] From British & Foreign State Papers, Vol. 81, p. 41.

Art. I.—The provisions of the said Article X are hereby made applicable to the following additional crimes:

1. Manslaughter when voluntary.

2. Counterfeiting or altering money; uttering or bringing into circulation counterfeit or altered money.

3. Embezzlement; larceny; receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained.

4. Fraud by a bailee, banker, agent, factor, trustee, or director, or member or officer of any company, made criminal by the laws of both countries.

5. Perjury, or subornation of perjury.

6. Rape, abduction, child stealing, kidnapping.

7. Burglary, housebreaking or shopbreaking.

8. Piracy by the law of nations.

9. Revolt, or conspiracy to revolt, by two or more persons on board a ship on the high seas, against the authority of the master; wrongfully sinking or destroying a vessel at sea, or attempting to do so; assaults on board a ship on the high seas, with intent to do grievous bodily harm.

10. Crimes and offences against the laws of both countries for the suppression of slavery and slave-trading.

Extradition is also to take place for participation in any of the crimes mentioned in this Convention or in the aforesaid Article X, provided such participation be punishable by the laws of both countries.

II. A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded by one of a political character, or if he proves that the requisition for his surrender has in fact been made with a view to try to punish him for an offence of a political character.

No person surrendered by either of the High Contracting Parties to the other shall be triable or tried, or be punished for any political crime or offence, or for any connected therewith, committed previously to his extradition.

If any question shall arise as to whether a case comes within the provisions of this Article, the decision of the authorities of the Government in whose jurisdiction the fugitive shall be at the time shall be final.

III. No person surrendered by or to either of the High Contracting Parties shall be triable or be tried for any crime or offence committed prior to his extradition, other than the offence for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered.

IV. All articles seized which were in the possession of the person to be surrendered at the time of his apprehension, whether being the proceeds of the crime or offence charged, or being material as evidence in making proof of the crime or offence, shall, so far as practicable, and if the competent authority of the State applied to for the extradition has offered the delivery thereof, be given up when the extradition takes place. Nevertheless, the rights of third parties with regard to the articles aforesaid shall be duly respected.

V. If the individual claimed by one of the two High Contracting Parties, in pursuance of the present Convention, should also be claimed by one or several other Powers on account of crimes or offences committed within their respective jurisdictions, his extradition shall be granted to that State whose demand is first received.

The provisions of this Article, and also of Articles II to IV inclusive, of the present Convention, shall apply to surrender for offences specified in the aforesaid Article X as well as to surrender for offences specified in this Convention.

VI. The extradition of fugitives under the provisions of this Convention and of the said Article X shall be carried out in Her Majesty's dominions and in the United States, respectively, in conformity with the laws regulating extradition for the time being in force in the surrendering State.

VII. The provisions of the said Article X and of this Convention shall apply to persons convicted of the crimes therein respectively named, and specified, whose sentence therefor shall not have been executed.

In case of a fugitive criminal alleged to have been convicted of the crime for which his surrender is asked, a copy of the record of the conviction and of the sentence of the Court before which such conviction took place, duly authenticated, shall be produced, together with the evidence proving that the prisoner is the person to whom such sentence refers.

VIII. The present Convention shall not apply to any of the crimes herein specified which shall have been committed or to any conviction which shall have been pronounced, prior to the date at which the Convention shall come into force.

IX. This Convention shall be ratified, and the ratifications shall be exchanged at London as soon as possible.

It shall come into force ten days after its publication, in conformity with the forms prescribed by the laws of the High Contracting Parties, and shall continue in force until one or the other of the High Contracting Parties shall signify its wish to terminate it, and no longer.

In witness whereof, the undersigned have signed the same, and have affixed thereto their seals.

Done in duplicate, at the City of Washington, this 12th day of July, 1889.

(L. S.) JULIAN PAUNCEFOTE
(L. S.) JAMES G. BLAINE

1900

## [1] Supplementary Convention Between Her Majesty and the United States of America for the Mutual Extradition of Fugitive Criminals (Enlarging List of Crimes)

Signed at Washington, December 13, 1900

(Ratification exchanged at Washington, April 22, 1901)

Her Majesty the Queen of Great Britain and Ireland and the President of the United States of America, being desirous of enlarging the list of crimes on account of which extradition may be granted under the Convention concluded between her Britannic Majesty and the United States on the 12th July 1889, with a view to the better administration of justice and the prevention of crime in their respective territories and jurisdictions, have resolved to conclude a Supplementary Convention for this purpose, and have appointed as their Plenipotentiaries, to wit:

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, His Excellency the Right Honourable Lord Pauncefote, Knight Grand Cross of the Most Honourable Order of the Bath, Knight Grand Cross of the Most Distinguished Order of St. Michael, and St. George, and Her Majesty's Ambassador Extraordinary and Plenipotentiary to the United States; and

The President of the United States, the Honourable John Hay, Secretary of State of the United States;

Who, after having communicated to each other their respective full powers which were found to be in due and proper form, have agreed to and concluded the following Articles:

Article I. The following crimes are added to the list of crimes numbered 1 to 10 in the first Article of the said Convention of the 12th July, 1889, on

[1] From British & Foreign State Papers, Vol. 92, p. 72.

account of which extradition may be granted, that is to say:

11. Obtaining money, valuable securities, or other property by false pretences.

12. Wilful and unlawful destruction or obstruction of railroads which endangers human life.

13. Procuring abortion.

Article II. The present Convention shall be considered as an integral part of the said Extradition Convention of the 12th July, 1889, and the first Article of the last-mentioned Convention shall be read as if the list of crimes therein contained had originally comprised the additional crimes specified, and numbered 11 to 13 in the first Article of the present Convention.

The present Convention shall be ratified, and the ratifications shall be exchanged either at London or Washington as soon as possible.

It shall come into force ten days after its publication, in conformity with the laws of the High Contracting Parties, and it shall continue and terminate in the same manner as the said Convention of the 12th July, 1889.

In testimony whereof the respective Plenipotentiaries have signed the present Convention in duplicate, and have thereunto affixed their seals.

Done at Washington, this 13th day of December 1900.

(L. S.) PAUNCEFOTE
(L. S.) JOHN HAY

## SUPPLEMENTARY CONVENTION TO THE SUPPLEMENTARY CONVENTION BETWEEN HER MAJESTY AND THE UNITED STATES OF AMERICA FOR THE MUTUAL EXTRADITION OF FUGITIVE CRIMINALS

Signed at Washington, December 13, 1900

Canada and the United States of America, being desirous of modifying and supplementing in certain respects the list of crimes on account of which ex-

tradition may be granted under the Treaties and Conventions in force between Canada and the United States of America, particularly the Convention concluded by the United States of America and Her Britannic Majesty on December 13, 1900, so as to comprehend any and all frauds which are punishable criminally by the laws of both contracting states, particularly those which occur in connection with transactions in securities, have decided to conclude a Supplementary Convention for that purpose and have appointed as their respective Plenipotentiaries:

Canada:

Lester Bowles Pearson, Secretary of State for External Affairs in the Government of Canada, and

Stuart Sinclair Garson, Minister of Justice and Attorney-General in the Government of Canada, and

The United States of America:

Don C. Bliss, Minister of the United States of America at Ottawa, who having communicated to one another their respective full powers, found in good and due form, have agreed as follows:

## ARTICLE I

The enumeration numbered 11 in Article I of the Supplementary Extradition Convention signed on December 13, 1900, between the United States of America and Her Britannic Majesty, is hereby amended to read as follows:

11A "Obtaining property, money or valuable securities by false pretences or by defrauding the public or any person by deceit or falsehood or other fraudulent means, whether such deceit or falsehood or any fraudulent means would or would not amount to a false pretence.

11B. "Making use of the mails in connection with schemes devised or intended to deceive or defraud the public or for the purpose of obtaining money under false pretences."

ARTICLE II

The Present Supplementary Convention shall be ratified and the instruments of ratification shall be exchanged at Ottawa.

The present Supplementary Convention shall enter into force on the day of the exchange of the instruments of ratification and it shall continue in force as though it were an integral part of the Supplementary Convention of December 13, 1900, subject to the provisions of Article II of that Supplementary Convention with respect to termination.

IN WITNESS WHEREFORE, the undersigned Plenipotentiaries have signed the present Supplementary Convention and have affixed thereto their respective seals.

Done in duplicate at Ottawa, this 26th day of October, 1951.

For Canada:

L. B. PEARSON
STUART S. GARSON

For the United States of America:

DON C. BLISS

## POINT I

**The treaties between the United States and the United Kingdom of Britain and Canada are applicable.**

The treaties and conventions set forth herein prescribes the conditions and terms under which persons accused of crimes in Canada may be extradited from the United States. The particular crimes ascribed to the defendants herein are larceny (theft) and larceny (theft) by deceit, falsehood and fraudulent means. This crime was specifically covered in the Supplementary Convention between Her Majesty and

the United States of America for the Extradition of Criminals, signed at Washington July 12, 1889 and which contained in part the following language:

> "Art. I. The provisions of Article X are hereby made applicable to the following additional crimes:
>
> 3. Embezzlement; larceny; receiving any money, valuable security, or other property, knowning the same to have been embezzled, stolen or fraudulently obtained.
>
> 4. Fraud by a bailee, banker, agent, factor, trustee, or director, or m ber or officer of any company, made criminal by t. ws of both countries."

It was also further enlarged upon in the Supplementary Convention signed in Ottawa on the 26th day of October, 1951, which read in part as follows:

ARTICLE I

> "The enumeration numbered 11 in Article I of the Supplementary Extradition Convention signed on December 13th, 1900, between the United States of America and Her Britannic Majesty, is hereby amended to read as follows:
>
> 11A. "Obtaining property, money or valuable securities by false pretenses or by defrauding the public or any person by deceit or falsehood or other fraudulent means, whether such deceit or falsehood or any fraudulent means would or would not amount to false pretense."

The crimes with which the petitioners have been charged with committing in the Province of Ontario, Canada, and for which they have been indicted in Ontario, Canada, are as follows:

> "*1st Count*: That the defendants did "steal money and securities to the value of $960,000.00 more or less, the property of Brilund Mines, Limited".
>
> *2nd Count*: That the defendants "by deceit, falsehood or other fraudulent means defrauded

Brilund Mines Limited of money and securities to the value of $960,000.00, more or less".

Thus, not only do the crimes with which the petitioners are charged fall squarely within the treaties in force but they are clearly charges which are crimes in the Asylum State, under Sections 1290-1295 of the Penal Law of the State of New York.

It has been held that obligations of treaty should be liberally construed so as to give effect to apparent intention of parties (*Valentine* v. *U. S. ex rel. Neidecker*, N. Y. 1936, 57 S. Ct. 100, 299 U. S. 5, 81 L. Ed. 5).

See also *Factor* v. *Laubenheimer*, Ill. 1933, 54 S. Ct. 191, 290 U. S. 276, 78 L. Ed. 315.

## POINT II

### The crimes charged are extraditable offenses.

The crime of receiving money knowing it to have been fraudulently obtained was an extraditable offense, under Dawes-Simon Extradition with Great Britain of 1932. *Factor* v. *Laubenheimer*, Ill. 1933, 54 S. Ct. 191, 290 U. S. 276, 78 L. Ed. 315.

See also *Cleugh* v. *Strakosch*, C. C. A. Col. 1940, 109 F. 2d 330.

See also *Wright* v. *Henkel*, N. Y. 1903, 23 S. Ct. 781, 786, 190 U. S. 40, 47 L. Ed. 948.

Obtaining money in Canada by false representations with intent to defraud, was an extraditable offense. *Bernstein* v. *Gross*, C. C. A. Tex. 1932, 58 F. 2d 154.

## POINT III

**An analysis of the documents introduced in evidence, and the testimony of the witnesses in said depositions is ample to support a finding of probable cause.**

Exhibits 4 and 4-A in evidence, the indictments found against the petitioners by the Grand Jury, contain a list of the witnesses who appeared and testified before that body. That list contains in part the following names: Ian Holt Smith, Benjamin Walter Chechak, Fred Findlay, Frank Ernest Udell, Vernon Bowman and James Hugh Gilmour Wallace. It is significant to note that the depositions of the aforementioned witnesses are also in evidence in this proceeding (Exhibit 5 and 5 A in evidence).

A resume of the testimony contained in said depositions shows the following facts to have been established. The petitioners, Sol R. Rauch and Harold D. Rauch, together with others sought to obtain control of the stock interests of the Brilund Mines Limited. They sought to accomplish this without any payments of their own funds, but rather by the devious means of using the money and property of the corporation to obtain control of the stock of said corporation and convert same to their own use and benefit. A geologist was hired to prepare a report on the value of a piece of property owned by one Stuart, to induce Brilund Mines to purchase said property. The geologist Chechak, gives the value of the property at something under One Thousand ($1,000.00) Dollars (Exhibit 5 and 5 A in evidence, page 12, lines 10 to 14). The petitioners, as officers and directors, bought this property from Stuart for Nine Hundred Sixty Thousand ($960,000.00) Dollars, paid for with a check of Brilund Mines Limited, signed by Sol R. Rauch as Secretary of the corporation (Exhibit 5 and 5 A in evidence, "B" page 15).

The proceeds of this payment to Stuart was disbursed by him as follows:

A check for Nine Hundred Thousand ($900,000.00) Dollars was issued by Stuart to Ben Smith in payment for the delivery of six hundred thousand shares of stock of the Brilund Mines Limited (Exhibit 5 and 5A in evidence, "B" page 13) to the Rauchs; Stuart and Shonbrun. This enabled the Rauchs and their associates to obtain the controlling interest of the corporation and approve the purchase of the Stuart property, worth under One Thousand ($1,000.00) Dollars, for the purchase price of Nine Hundred Sixty Thousand ($960,000.00) Dollars (Exhibit 5 and 5A in evidence, "B" page 35).

Stuart then proceeded to pay to Bowman and Wallace a finders fee of Fifty Thousand ($50,000.00) Dollars out of the Nine Hundred Sixty Thousand ($960,000.00) Dollars proceeds of the sale of worthless property, for the benefit of the Rauchs and their associates (Exhibit 5 and 5A in evidence, "B" page 21). This check was drawn by Stuart and cashed. Bowman and Wallace received Twenty Five Thousand ($25,000.00) Dollars in cash, each.

This left Ten Thousand ($10,000.00) Dollars in the possession of Stuart for the property he sold, and One Hundred Thousand (100,000) Shares of Brilund Mines Limited, valued at about Forty Thousand ($40,000.00) Dollars. Stuart then drew a check for Five Thousand Nine Hundred Ninety ($5,990.00) Dollars which he cashed (Exhibit 5 and 5A in evidence, "B" page 22). He turned the proceeds of this check over to the Rauchs in the presence of the witness Udell (Exhibit 5 and 5A in evidence, page 31, lines 28 to 30).

This left Stuart with Four Thousand Ten ($4,010.00) Dollars of the proceeds of the Nine Hundred Sixty Thousand ($960,000.00) Dollars from the sale, which, in addition to the One Hundred Thousand (100,000) Shares of Stock, was the actual monies he received for selling the property to Brilund Mines Limited for Nine Hundred Sixty Thousand ($960,000.00) Dollars.

It is thus established that the Rauchs, by their theft of the monies in the treasury of the Brilund Mines Limited, acquired for their own use and benefit Five Hundred Thousand (500,000) Shares of the common stock of the corporation, a controlling interest, as well as Five Thousand Nine Hundred Ninety ($5,990.00) Dollars in cash from the proceeds of the fraudulent purchase of Stuart's worthless property, as well as Fifty Thousand ($50,000.00) Dollars paid to Wallace and Bowman, as finders, to induce Smith to turn over the control of the corporation to the Rauchs and their associates.

The evidence clearly shows that Smith was induced to part with his stock, for the Rauchs offered him a price of One Dollar and Fifty Cents ($1.50) per share for a stock then selling on the Exchange for Forty Cents (40¢) per share. This was not hard to do, for the defendants were making this purchase with the corporation's money, and not with their own funds.

## POINT IV

**The majority of cases cited by petitioners in their brief completely support the contentions of the respondents herein.**

Throughout the entire brief submitted by the petitioners herein, there are many cases cited as supporting their contentions when in truth and in fact they actually completely support the arguments advanced by the respondents herein. For instance, on pages 16 and 20 of petitioners' brief they cite the case of *United States* v. *Corbett*, 215 U. S. 233, as authority for the statement that "intent" must be alleged in the indictment since it is a necessary element. In truth and in fact, the dictum of the case is that where intent is an essential ingredient of a crime it may be charged in general terms and its existence becomes a question for the jury, excepting only where the criminal intent could not, as a

matter of law, have existed under any possible circumstances.

Also on pages 16 and 20 of petitioners' brief is cited the case of *People* v. *Adamchesky*, 184 Misc. 769, 55 N. Y. Supp. (2), 90 U. S. Code 451, for the same proposition as set forth in the preceding paragraph. Actually this case has no application at all. In the *Adamchesky* case the defendants were indicted for larceny in New York County and in a separate indictment were charged with transporting stolen goods as a Federal offense in the Federal Court. The Court, in sustaining the sufficiency of the indictment, held that this was perfectly proper since they were separate crimes and were charged sufficiently so that the defendant would be aware of the nature of the charge against him.

On page 19 of petitioners' brief, they cite the case of *People* v. *Weiss*, 300 N. Y. Supp. 249, as authority for the proposition that the Court of Appeals has ruled when particular or specific "intent" is essential to and is the gist of offense, it is necessary to allege "intent" with distinctness and precision, and to support such allegation by proof. Actually, *People* v. *Weiss* is authority for holding an indictment alleging that on a designated day a designated person was seized, confined and detained against his will and without authority of law until a particular day, sufficiently pleaded the statutory crime of kidnapping notwithstanding failure to plead the "intent" with which victim was seized and confined. The Court determined the test of sufficiency of indictment is whether indictment identifies charge against defendant so that his conviction or acquittal will bar a subsequent charge for the same offense and whether he is charged so as to enable him to prepare his defense.

The Court said at page 255:

> "In applying this test Courts should be liberal, not technical. Thus construed, the indictment is sufficient and the defendants were not prejudiced by the

> failure to plead the crime charged in the identical words of the Statute. To hold otherwise would be to sacrifice substance to form and 'abandon much that has been accomplished to simplify procedure upon criminal trials.'' *People* v. *Marcus*, 235 App. Div. 397, 257 N. Y. S. 424, 428.

So it is apparent that the case cited by the petitioners completely supports the contentions of the respondents herein, for the indictment and the affidavits submitted in evidence before the Commissioner certainly are sufficient information for the defendant to understand not only the crime with which he is being charged, but actually supply him with the evidence of the commission of the crime as testified to by witnesses in the Courts in Canada.

On page 4 of the petitioners' brief there is cited the case of *Vaccaro* v. *Collier*, 38 F. (2d) 862, as authority for the fact that the law of the asylum State prevails. In truth and in fact this case is authority for the rule of law that a Writ of Habeas Corpus cannot be used as a means for obtaining rehearing of what Commissioner has already decided in proceedings for extradition of alleged fugitive to a foreign country.

On pages 21 and 26 of petitioners' brief they cite the case of *Capone* v. *United States*, 56 F. 2d 927, as supporting the contentions of the petitioners therein. This case stands for the proposition that an indictment is sufficient if it apprises the accused with reasonable certainty, of the nature of the accusation against him.

*Ex Parte Davis*, 54 F. 2d 723, is an exceptionally strong argument in favor of the respondents herein, for it was held in that case that sufficiency of the charge in Mexico was not before the Commissioner in extradition proceedings except insofar as tending to show an extraditable crime had been committed (18 U. S. C. A. 3184). In the instant case there was ample proof before the Commissioner of

not only the statutory requirements of the Canadian Criminal Code but also of the New York Penal Law and that the appellants herein had committed an extraditable offense.

The case of *People* v. *Damar*, 106 N. Y. 502, cited on page 26 of petitioners' brief has no application at all in this case for that case turned upon the fact that one form of larceny was pleaded in the indictment but another form of larceny was proven upon the trial and for that reason the conviction was reversed. The petitioners lose sight of the fact that while the necessary ingredient of a crime is the intent to commit same, the burden upon the prosecution is to prove that intent upon the trial and if the charge sufficiently clarifies the crime committed the facts of intent can thereafter be proven upon the trial itself.

It is one thing to write a voluminous brief and to cite many cases but all of this work accomplishes naught if the cases cited do not clearly show a determination of the legal problems therein. It is submitted that the petitioners have failed to set forth any leading cases that truly support the untenable position which they must, of necessity, take in the instant case. They overlook completely the tendency on the part of the Courts of this country to give full faith and credit not only to the treaties involved with foreign countries but also to eliminate the many technical objections which are the only defenses which can be raised in matters of extradition. The stress laid by the appellants on the sufficiency of the indictment is a mere surplus usage of vocabulary for in the instant case the evidence of finding probable cause is so completely shown by the authenticated depositions in evidence before the Commissioner that if no indictment had ever been offered in evidence there still would have been more than ample evidence before the Commissioner to find probable cause as he did.

## POINT V

**The holding by the Commissioner, the dismissal of the Writ of Habeas Corpus by Judge Byers and unanimous affirmance of these two decisions by the United States Court of Appeals for the Second Circuit are all amply supported by the extradition laws of the United States and the many reported decisions under those laws.**

The language of the Supreme Court (Mr. Justice Holmes) in *Glucksman* v. *Henkel*, 221 U. S. 508, at 512, applies here as suggested by Judge Byers, in which the Court said:

> "It is common in extradition cases to attempt to bring to bear all the factitious niceties of a criminal trial at common law. But it is a waste of time. For while of course a man is not to be sent from the country merely upon demand or surmise, yet if there is presented, even in somewhat untechnical form according to our ideas, such reasonable ground to suppose him guilty as to make it proper that he should be tried, good faith to the demanding government requires his surrender. *Grin* v. *Shine*, 210 U. S. 387, 405."

Extradition is a summary ministerial proceeding to expedite apprehension and return of fugitives, rather than a judicial proceeding to inquire into merits of charges, and this section should be accorded a liberal construction to accomplish return of fugitive summarily. *People ex rel. Millet* v. *Babb*, 1953, 115 N. E. 2d 241, 1 Ill. 2d 786.

Proceedings on application by foreign country for extradition of persons charged with crime, as provided for by treaty, is not a criminal proceeding, and greater liberality in reception of evidence is to be exercised than in criminal or other civil proceedings. *In re Lo Dolce*, D. C. N. Y. 1952, 106 F. Supp. 455.

Emigrants and exiles for cause of political difference at home are entitled to asylum in this country, but not malefactors; on the contrary, the foreign government which reclaims its fugitive malefactors is serviceable to us by ridding us of the intrusive presence of crime, hence, when reclamation of a fugitive from justice is made under treaty stipulation by any foreign government, it is the duty of the United States to aid in relieving the case of any technical difficulties which may be interposed to defeat the ends of public justice, the object to be accomplished being alike interesting to both governments, namely the punishment of malefactors, who are the common enemies to all society. 1855, 7 op. Atty. Gen. 537.

The complaint in this proceeding is in proper legal form, and clearly apprises the defendants of the nature of the charges against them. The complaints clearly show that warrants for the arrest of the defendants were issued by a Justice of the Peace for the County of York, Province of Ontario, for the

> "theft of money and securities of the value of Nine Hundred Sixty Thousand ($960,000.00) Dollars obtained by deceit, falsehood or other fraudulent means, the property of Brilund Mines Limited, a crime under the Laws of Canada, being Chapter 51, 2-3 Eliz. II, Statutes of Canada, 1953-54, with amendments thereto, embodying Sections 269 (1), 274, 276, 280, 323.(1), 2.(15) of the Criminal Code of Canada."

Thus, not only is the nature of the crime clearly set forth, but also the petitioners were apprised of the Specific Sections of the Criminal Code of Canada which they were alleged to have violated.

Where a complaint on which extradition proceedings are based intelligibly describes and identifies the offense, which is punishable by the laws of both countries and is included in the extradition treaty, it is not material that it is not described by the same name in the laws of both

countries or at common law. *Powell* v. *U. S.*, Mich. 1913, 206 F. 400, 124 C. C. A. 282.

The complaint, to give jurisdiction, need not have the precision of an indictment, but should set forth the substantial features of the offense, so that the Court can see that the particular crime charged is one enumerated in the treaty. *In re Adutt*, c.c. Ill. 1893, 55 F. 376.

Under Article 10 of the extradition treaty with Great Britain of 1842, a complaint for the arrest and examination of an alleged offender was not required to set out the offense with the particularity of an indictment, but would be sufficient if it conformed to the requirements of a preliminary complaint under the local law where the accused was found. *In re Herskovitz*, D. C. Ohio 1901, 136 F. 713.

Where a complaint, on oath by a duly authorized officer of Canada, alleged that S. had been charged before a Justice of the Peace of Canada with murder there committed, and a warrant issued for her arrest, the original warrant being attached to the complaint, and that the officer believed the charge as stated in the warrants to be true, it was sufficient to give the Commissioner jurisdiction to issue a warrant for the arrest of S. *Ex parte Sternaman*, D. C. N. Y. 1896, 77 F. 595, affirmed 80 F. 883, 26 C. C. A. 214, application for reargument denied 83 F. 690, 28 C. C. A. 377.

Canadian Government was entitled to extradition of alleged violator of Canadian Laws even though the complaint set forth offense covered by Laws of Canada as "theft or stealing" and of State where offender was being held as "fraud", and which was designated in complaint as larceny. *U. S. ex rel. Hatfield* v. *Guay*, D. C. N. H. 1935, 11 F. Supp. 806, modified 87 F. 2d 358, certiorari denied 57 S. Ct. 669, 300 U. S. 678, 81 L. Ed. 883, rehearing denied 57 S. Ct. 793, 301 U. S. 713, 81 L. Ed. 1365.

The attack upon the validity of the indictment, which appears to be the main point of this petition must fail for several reasons. In the first place, the forum in which the validity of the indictment may be attacked, is in the Courts of Canada, after the defendants have been returned to plead to said indictment. Secondly, the presence of the indictment is superfluous for the purpose of this proceeding, and was made a part hereof merely for the purpose of helping the Commissioner determine the question of probable cause. Under Section 3182, Title 18 of the U. S. Code Annotated, all of the leading cases held that the indictment is prima facie evidence of probable cause.

If Grand Jury has returned indictment that document is prima facie evidence of probable cause, as regards sufficiency of requisition in extradition proceeding. *U. S. ex rel. McCline* v. *Mevering*, C. C. A. Ill. 1935, 75 F. 2d 716.

The indictment is sufficient if it conforms to the Law of the State where the offense is committed. *Webb* v. *York*, Colo. 1897, 79 F. 616, 25 C. C. A. 133.

An indictment alone ordinarily is sufficient to permit extradition of accused to demanding State because indictment presupposes testimony of witnesses before Grand Jury. *People ex rel. Lipschitz* v. *Bessenger*, 1947, 75 N. Y. S. 2d 392, 273 App. Div. 19.

In an extradition proceeding the technical sufficiency of an indictment as a pleading will not be examined further than to ascertain whether it substantially charges a crime, and whether its allegations are good in substance, and its technical accuracy as a pleading will be left to the tribunal of the demanding State, in which it was found and is pending. *People ex rel. MacSherry* v. *Enright*, 1920, 184 N. Y. S. 248, 112 Misc. 568, affirmed 188 N. Y. S. 945.

An indictment against a person sought to be extradited, duly certified was conclusive in the absence of fraud, and justified a warrant of arrest by the Governor of this State. *Peo. ex rel. Marshall* v. *Moore*, 1915, 153 N. Y. S. 10, 167 App. Div. 479, affirmed 112 H. E. 1070, 217 N. Y. 632.

In the present case it is clearly shown that the offense occurred in Toronto, Province of Ontario, Canada, and that the offenses alleged in the indictment are contained in the various treaties between the United States, Great Britain and Canada.

All of the affidavits submitted upon the hearing of this matter being properly authenticated are admissible in this proceeding. In the case of *Bingham* v. *Bradley*, Ill. 1916, 36 S. Ct. 634, 241 U. S. 511, 60 L. Ed. 1136, the Court held that properly authenticated affidavits were not inadmissible in proceedings for extradition to Canada because taken ex rel. party under treaty with Great Britain August 9, 1842, Article 10, and R. S.

The Court also held in *Ex parte Schorer*, D. C. Wisc. 1912, 197 F. 67, that former Section 655 of Title 18 made the consular certificate the final and controlling guide in determining the admissibility of testimony before the Extradition Commissioner, and when the documentary evidence has been authenticated by this Section (3190 Title 18, U. S. Code Annotated), it was admissible, leaving to the Commissioner merely the question of determining sufficiency of the evidence therein contained.

An indictment, or its equivalent, in the foreign country, is not necessary to authorize extradition for a crime committed therein. *Muller's Case*, D. C. Pa. 1863, Fed. Cas. No. 9,913.

Good faith to the demanding foreign government requires the surrender of the accused in extradition proceedings if there is presented, even in somewhat untechnical form, such reasonable ground to suppose him guilty

of crime as to make it proper that he should be tried. *Glucksman* v. *Henkel*, N. Y. 1911, 31 S. Ct. 704, 705, 221 U. S. 508, 55 L. Ed. 830.

International extradition will not be refused for lack of refinements of pleading required by either jurisdiction. *Bernstein* v. *Gross*, C. C. A. Tex. 1932, 58 F. 2d 154.

The dismissal of the Writ by Judge Byers was proper. As he pointed out in his written decision, the appellants did not urge before him that the depositions and the indictment did not constitute a prima facie showing that they did the things charged. The appellants had the benefit of the depositions which were before the Commissioner. The appellants were thus fairly apprized of the charges against them, the offenses charged are extraditable, and there was reasonable cause presented to the Commissioner to hold them for extradition. Therefore the Writ of Habeas Corpus was properly dismissed.

In order to justify a Commissioner in issuing a certificate to the executive authority for the surrender of the accused in extradition proceedings, it is sufficient if the accused is held on competent legal evidence, and if probable cause exists for believing him guilty of the offense charged, and the evidence need not be conclusive, nor must the Commissioner be absolutely convinced of the guilt of accused. *United States* v. *Piaza*, D. C. N. Y. 1904, 133 F. 998.

Habeas Corpus is available to party whose extradition is sought by foreign country only to inquire whether Magistrate holding party for extradition had jurisdiction, whether offense charged is within treaty, and whether there was reasonable ground to believe accused guilty. *U. S. ex rel. Hatfield* v. *Guay, supra.*

See also:

*Fernandez* v. *Phillips*, 1925, 45 S. Ct. 541, 268 U. S. 311, 69 L. Ed. 970;

*Bingham* v. *Bradley*, Ill. 1916, 36 S. Ct. 634, 241 U. S. 511, 60 L. Ed. 1136.

The Court issuing the Writ of Habeas Corpus must

> "inquire and adjudge whether the Commissioner acquired jurisdiction of the matter, by conforming to the requirements of the treaty and the Statute; whether he exceeded his jurisdiction; and whether he had any legal or competent evidence of facts before him, on which to exercise a judgment as to the criminality of the accused. But such Court is not to inquire whether the legal evidence of facts before the Commissioner was sufficient or insufficient to warrant his conclusions; nor, if there was legal and competent evidence of facts before the Commissioner for him to consider in making up his decision as to the criminality of the accused, is the Court, on Habeas Corpus, to hold the proceedings illegal, and to discharge the prisoner, because some other evidence was introduced which was not legal or competent, but was held to be so by the Commissioner, and was considered by him on the question of fact, or because the Court, on a consideration of all the evidence which the Commissioner considered, would have come to a different conclusion, or because the Court, on an exclusion of such of the evidence as it may think was not legal or competent, would come, on the rest of the evidence, to a different conclusion of facts from that at which the Commissioner arrived." *In re Stupp*, C. C. N. Y. 1875, 12 Blatchf. 501, 23 Fed. Cas. No. 13,563.

In Habeas Corpus proceedings for the discharge of a prisoner held on an extradition warrant, the technical sufficiency of the indictment on which the warrant was issued is not open to question. *Ex parte Birdseye*, D. C. N. Y. 1917, [illegible] F. 972, affirmed 38 S. Ct. 424, 246 U. S. 657, 62 L. Ed. [illegible].

In a proceeding by Habeas Corpus, an executive warrant for the arrest of a fugitive from justice ought not to

be pronounced void merely because of some technical defect in the foreign indictment or affidavit, provided the offense is substantially alleged or described. *Webb* v. *York*, Colo. 1897, 79 F. 616, 25 C. C. A. 133.

## POINT VI

**The petition for a Writ of Certiorari should be denied and the relators-petitioners remanded to the custody of the respondents to await the action of the Department of State in returning the relators-petitioners to Canada for trial.**

Respectfully submitted,

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